

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEYS FOR APPELLANT:

SUSAN K. CARPENTER
Public Defender of Indiana

ANNE-MARIE ALWARD
Deputy Public Defender
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

JODI KATHRYN STEIN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

LESLEY JACKSON,)	
)	
Appellant-Petitioner,)	
)	
vs.)	No. 64A04-0610-PC-564
)	
STATE OF INDIANA,)	
)	
Appellee-Respondent.)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Julia M. Jent, Judge
Cause No. 2-81-CCR-284JF

June 5, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Lesley Jackson appeals the denial of his petition for post-conviction relief. The sole issue for our review is whether the post-conviction court erred in denying the petition on the basis of the doctrine of laches.

We affirm.

FACTS AND PROCEDURAL HISTORY

In 1982, Jackson was convicted in a bench trial of Class D felony theft. The trial court sentenced him to three years executed. Jackson's sentence was modified to 2 and ½ years after he filed a motion to correct error. Jackson did not appeal his conviction or sentence.

In 2002, Jackson filed a petition for post-conviction relief that was dismissed in 2004 for failure to prosecute. In 2006, Jackson filed a second post-conviction relief petition wherein he argued that he was not advised that he had a right to a jury trial on the Class D felony charge and that trial counsel was ineffective for failing to advise Jackson of this right.

The post-conviction court held a hearing where the evidence revealed that that neither the prosecutor nor the defense attorney had any recollection of the more than twenty-year-old case. Further, the trial court judge was deceased, and the trial transcript was not available because there was no cataloging or filing system at that time. In addition, the evidence revealed that Jackson was convicted of six more felonies after he was convicted of the felony in this case. Jackson also consulted with attorneys and was incarcerated during this time. Following the hearing, the post-conviction court denied Jackson's petition. Specifically, the court's order provides in part as follows:

The Court finds that defendant unreasonably delayed in that he waited

more than twenty (20) years from the time of his April 1982 conviction for theft until August 2002 when defendant filed the petition for post-conviction relief. Court further finds that defendant had or should have had knowledge of the defect in his conviction in that defendant had frequent contact with the criminal justice system, attorneys, and legal facilities in penal institutions during those twenty (20) years due to six (6) felony convictions during that time.

The Court finds that defendant prejudiced the State in that the State conducted a diligent search which produced incomplete records of the trial materially impeding the State's ability to successfully argu[e] its case.

Appellant's App. at 59D. Jackson appeals.

DISCUSSION AND DECISION

Jackson contends that the trial court erred in denying his petition on the basis on laches. A petitioner who has been denied post-conviction relief faces a vigorous standard of review. Under the rules of post-conviction relief, the petitioner must establish the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). To succeed on appeal from the denial of relief, the post-conviction petitioner must show the evidence is without conflict and leads only to a conclusion opposite that of the trial court. *Sanders v. State*, 764 N.E.2d 705, 709 (Ind. Ct. App. 2002). Further, the reviewing court accepts the post-conviction court's findings of fact unless clearly erroneous. *Dewitt v. State*, 755 N.E.2d 167, 169 (Ind. 2001).

The equitable doctrine of laches operates to bar consideration of the merits of a claim or right of one who has neglected for an unreasonable time, under circumstances permitting due diligence, to do what in law should have been done. *Armstrong v. State*, 747 N.E.2d 1119, 1120 (Ind. 2001). For laches to apply, the State must prove by a preponderance of the evidence that the petitioner unreasonably delayed in seeking relief and that the State is

prejudiced by the delay. *Id.* In reviewing a finding of laches, the applicable standard of review is the same as in any other sufficiency question. *Id.* Without reweighing the evidence or assessing the credibility of witnesses, but looking only to the evidence and reasonable inferences favorable to the judgment, we will affirm if there is probative evidence to support the post-conviction court's judgment. *Id.*

In determining whether the trial court properly denied Jackson's petition on the basis of laches, we initially observe that unless a petitioner has knowledge of the defect in his conviction or the means to seek relief from the conviction, he can seldom be said to have delayed unreasonably in seeking relief. *Lile v. State*, 671 N.E.2d 1190, 1194 (Ind. Ct. App. 1996). Many factors are considered when determining whether a petitioner had knowledge of post-conviction remedies, such as repeated contacts with the criminal justice system, incarceration in a penal institution with legal facilities, and consultation with counsel. *Id.* While the mere passage of time is not enough to constitute laches, it is another factor to consider when evaluating the petitioner's knowledge. *Id.* The Indiana Supreme Court has recognized that a change of circumstances, such as incarceration, provides a petitioner with adequate opportunity and incentive to inquire about his rights and remedies. *Gregory v. State*, 487 N.E.2d 156, 158 (Ind. 1986).

Here, Jackson was convicted of six more felonies after he was convicted of the felony in this case. He also consulted with attorneys and was incarcerated during this time. Based upon this evidence, the post-conviction court properly concluded that a more than twenty-year delay in challenging the theft conviction was unreasonable. Jackson has failed to show that the evidence is without conflict and leads only to a conclusion opposite that of the trial

court.

In addition to unreasonable delay, we must also determine whether the State was prejudiced by such delay. Prejudice exists when the unreasonable delay operates to materially diminish a reasonable likelihood of successful reprosecution. *Kirby v. State*, 822 N.E.2d 1097, 1100 (Ind. Ct. App. 2005), *trans. denied*. The inability to reconstruct a case against the petitioner is demonstrated by unavailable evidence such as destroyed records, deceased witnesses, or witnesses who have no independent recollection of the event. *Id.* The State has an obligation to use due diligence in its investigation of the availability of evidence and witnesses. *Id.*

In this case, the trial transcript was not available, and the trial court judge was deceased. In addition, the prosecutor and defense counsel had no independent recollection of the trial. Under these circumstances, the State would be unable to defend against Jackson's claim that he did not waive his right to trial by jury. Based upon this evidence, the post-conviction court could reasonably conclude that the State was prejudiced by its diminished ability to successfully reprosecute the case.

Affirmed.

DARDEN, J., and MATHIAS, J., concur.